CHIN HEIN CHONG v. TEY SIN SZE & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[ORIGINATING SUMMONS NO: 17D-32-10-2015]
29 NOVEMBER 2016

LEGAL PROFESSION: *Disciplinary proceedings – Appeal against decision of Disciplinary Board – Solicitor acted for client in sale and purchase agreement with vendor – Allegation that solicitor caused delays to advise client's financier to draw down facility obtained by client to purchase property – Disciplinary Board found solicitor had acted in gross disregard of client's interest – Solicitor imposed with penalty of RM5,000 – Whether solicitor owed duty to communicate with client – Whether solicitor breached provisions of Legal Profession Act 1976 or Legal Profession (Practice and Etiquette) Rules 1978*

LEGAL PROFESSION: *Conflict of interest – Professional conduct – Solicitor acted for both purchaser and financier in sale and purchase agreement – Whether solicitor could maintain professional independence – Whether solicitor had put himself in conflict of interest situation – Legal Profession (Practice and Etiquette) Rules 1978, r. 5*

The first respondent had entered into a sale and purchase agreement ('the SPA') with the vendor in relation to a property. The completion date was 29 December 2009. The first respondent's financier's letter of undertaking dated 21 December 2009 was given and delivered to the vendor's solicitors five days before the expiry of the completion date. However, by way of a letter dated 8 January 2010 addressed to the first respondent and the financier's solicitor ('the appellant') firm, the vendor demanded the first respondent to settle the purchase price within 14 days from the date of their letter otherwise the deposit paid would be forfeited as liquidated damages ('the letter dated 8 January 2010'). The appellant failed to communicate this to the first respondent, causing the deposit to be forfeited and the property sold without the first respondent's knowledge and consent. The first respondent lodged a complaint with the Disciplinary Board ('the DB'), against the appellant as it was alleged that the latter's firm had caused delays to advise the first respondent's financier to draw down the housing facility obtained by the first respondent to purchase the property. The Disciplinary Committee ('the DC') recommended that the appellant be reprimanded and imposed with a penalty of RM5,000. The DB found that the appellant had acted in gross disregard of his client's interest pursuant to s. 94(3) of the Legal Profession Act 1976 ('the LPA') and adopted the DC's recommendation. Hence, the present appeal by the appellant against the decision of the DB. The issues that arose for the court's adjudication were

A (i) whether the developer was obliged to inform the purchaser of the letter dated 8 January 2010; (ii) whether the appellant had put himself in a conflict of interest situation; (iii) whether the appellant owed a duty to communicate with the first respondent; and (iv) whether the appellant had breached the LPA and the Legal Profession (Practice and Etiquette) Rules 1978
B ('the LPR').

Held (dismissing appeal):

(1) Under the SPA, the developer was under no duty or obligation to perform the terms of the SPA and/or the documentation checklist of the financier. The developer was not a party to the SPA or the bank's credit
C facilities letter. The appellant should have (i) requested for an extension of time for the completion of the sale and purchase transaction; and (ii) advised the first respondent immediately upon receipt of the letter dated 8 January 2010 that the first respondent should pay cash in order to complete the sale and purchase transaction to avoid forfeiture of the
D deposit. (paras 12 & 14)

(2) By acting for two parties, namely the first respondent and the first respondent's financier in the sale and purchase transaction, the appellant had put himself in a position where he would not be able to maintain
E his professional independence. Having accepted the brief from both parties, the appellant had acted in breach of r. 5 of the LPR. The conflict of interests arose when the appellant failed to disclose the letter dated 8 January 2010 from the vendor's solicitors demanding the purchaser to settle the balance purchase price within 14 days from the date of the said letter. (paras 16, 17, 19 & 20)

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(3) The negligent act of the appellant resulted in the first respondent not being able to purchase the property. When the appellant received the letter dated 8 January 2010, he should have immediately informed and communicate this important notice to the first respondent. The appellant made a decision without consulting the first respondent, resulting in the
G SPA being terminated and the deposit being forfeited by the vendor. As the first respondent's solicitor, the appellant was under the obligation and duty, contractually and/or under law of tort to inform, communicate and consult the first respondent regarding any instruction to be taken which may affect her interest under the SPA. (paras 22-25)

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(4) The DB's order was justified. The appellant's conduct clearly showed that he disregarded his client's interest and had acted in jeopardy of the same. The appellant had breached s. 94(3)(d) of the LPA and rr. 16 and 31 of the LPR. (paras 26 & 30)

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Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 5, 16, 31, 35(b)
Legal Profession Act 1976, s. 94(3)(n)

For the plaintiff - Michael Chow Keat Thye, Eric Soon & Wilson Cheah; M/s KH Wong, Chin & Cheah
For the 1st respondent - Ho Ho Mun; M/s Sulaiman Ho & Co
For the 2nd respondent - Olivia Lee Yee Teng & Jason Tan; M/s Lee Lam & Tan

Reported by Najib Tamby

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The plaintiff filed an appeal against the decision of Disciplinary Board (DB) dated 10 September 2015 to fine the appellant for the sum of RM5,000 in relation to the complaint lodged by the first respondent against the appellant.

The Background Facts

[2] The relevant background facts are as follows.

[3] The first respondent had lodged the complaint against the appellant for the reasons, amongst others, the appellant's firm, Messrs KH Wong, Chin & Cheah ("appellant's firm") had caused delays to advise the first respondent's financier, Hong Leong Bank Berhad (Company No: 97141-X) ("first respondent's financier") to draw down the housing facility obtained by the first respondent to purchase a double storey terrace house known as Taman Damai Utama ("property") with the purchase price of RM325,000 ("purchase price"), resulting in the deposit amounting to RM32,500 ("deposit") paid by the first respondent being forfeited by the vendor.

[4] The vendor and the first respondent entered into a sale and purchase agreement ("SPA") on 10 August 2009 in relation to the property.

[5] In accordance with cl. 2(b) of the SPA, the completion date was on 29 November 2009 as confirmed by the appellant on the ground that the developer's letter of undertaking was given to his firm on 1 September 2009. And pursuant to cl. 3 of the SPA, the extended completion date was on 29 December 2009.

[6] Before the expiry of the extended completion date, the bank's letter of undertaking dated 21 December 2009 was given and delivered to M/s SC Lim & Ptn, the vendor's solicitors on 24 December 2009 (five days before expiry). However, the vendor's solicitors by way of letter dated 8 January 2010 addressed to the appellant's firm demanded the first respondent to settle

A the balance purchase price within 14 days from the date of their letter otherwise the deposit paid, RM32,500 would be forfeited as liquidated damages.

[7] The deposit amounted to RM32,500 was forfeited on 22 January 2010 and the said property was sold on 24 February 2011 without the first
B respondent's knowledge and consent.

[8] The first respondent lodged a complaint against the appellant with the Disciplinary Board on 12 July 2014. The hearing of the complaint by the Disciplinary Committee was on 12 May 2015 and on 22 July 2015 the
C Disciplinary Committee recommended the appellant to be reprimanded and imposed with a penalty of RM5,000. On 10 September 2015, the Disciplinary Board adopted the recommendation of the Disciplinary Committee regarding the imposition of fine amounting to RM5,000.

Issues

D **[9]** The issues for this court's consideration are as follows:

(i) whether the developer is obliged to inform the purchaser of the letter dated 8 January 2010;

(ii) whether the appellant had put himself in a conflict of interest situation;

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(iii) whether the appellant owe a duty to communicate with the first respondent; and

(iv) whether the appellant had breached the Legal Profession Act 1976 and the Rules under the Act.

F *Whether The Developer Is Obliged To Inform The Purchaser Of The Letter Dated 8 January 2010*

[10] Pursuant to the Disciplinary Committee report, the Disciplinary Board ("DB") found that the appellant had acted in gross disregard of the first respondent's interest pursuant to s. 94(3) of the Legal Profession Act 1976
G based on the following findings:

(i) the appellant should have requested for an extension of time for the completion of the sale and purchase transaction; and

(ii) the appellant should have advised the first respondent immediately upon
H receipt of the vendor's solicitors' letter dated 8 January 2010 that the first respondent should pay cash in order to complete this sale and purchase transaction to avoid forfeiture of the deposit.

[11] The appellant contended that the DB had erred in its findings that the appellant had acted in gross disregard of his client's interest.

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[12] I agreed that under the SPA, the developer was under no duty or obligation to perform the terms of the SPA and/or the documentation checklist of the financier. The developer was not a party to the SPA or the bank's credit facilities letter.

[13] Under the SPA and/or the bank's credit facilities letter, it did not specify that the vendor and/or vendor's solicitors was/were under the warranty, duty or obligation to obtain and provide to the appellant the developer's written confirmation and evidence of submission of sub-division of the land as contended by the appellant.

[14] Hence, I find that the DB was correct in making a finding of fact that:

(i) the appellant should have requested for an extension of time for the completion of the sale and purchase transaction; and

(ii) the appellant should have advised the first respondent immediately upon receipt of the vendor's solicitors' letter dated 8 January 2010 that the first respondent should pay cash in order to complete this sale and purchase transaction to avoid forfeiture of the deposit.

Whether The Appellant Had Put Himself In A Conflict Of Interest Situation

[15] The evidence clearly shows that the appellant had put himself in a conflict of interest situation between the first respondent as the purchaser and the first respondent's financier.

[16] By acting for two parties, that is, the first respondent and the first respondent's financier in this sale and purchase transaction, the appellant had put himself in a position where he would not be able to maintain his professional independence.

[17] Therefore, having accepted the brief from both parties, the appellant had acted in breach of r. 5 of the Legal Profession (Practice and Etiquette) Rules 1978 (LPPER).

[18] Rule 5 of the LPPER states:

> Rule 5. No advocate and solicitor to accept brief if difficult to maintain professional independence.
>
> (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.
>
> (b) (i) An advocate and solicitor who has at any time advised or drawn pleading or acted for a party in connection with the institution or prosecution or defense of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.
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> (ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

[19] The conflict of interests arose when the appellant failed to disclose the letter dated 8 January 2010 from the vendor's solicitors demanding the purchaser to settle the balance purchase price within 14 days from the date of the said letter.

[20] In my view, the DB was correct in making a finding of fact that the appellant was under the duty to advise and disclose the letter dated 8 January 2010 from the vendor's solicitors demanding the purchaser to settle the balance purchase price within 14 days from the date of the said letter.

Whether The Appellant Owe A Duty To Communicate With The First Respondent

[21] When the appellant received the letter dated 8 January 2010 from the vendor's solicitors demanding full settlement of the balance purchase price within 14 days from the date of the said letter otherwise, the deposit paid under the SPA would be forfeited, he should have immediately informed and communicated this important notice to his client, the first respondent.

[22] In the present case, the appellant made the decision without consultation with the first respondent which has resulted in the SPA being terminated and the deposit amounted to RM32,500 being forfeited by the vendor.

[23] I agreed with the first respondent's submission that the negligent act of the appellant resulting in the first respondent not able to purchase the said property. The evidence shows that at the material time, the first respondent had RM511,046.26 in her Hong Leong Bank Berhad's current account no: 19400036242 which sum was more than enough to settle the balance purchase price.

[24] In my view, as the first respondent's solicitor was under the obligation and duty, contractually and/or law of tort, to inform, communicate and consult the first respondent when the appellant having received the vendor's solicitors letter dated 8 January 2010 demanding for the payment of the balance purchase price within 14 days from the date of the said letter.

[25] The appellant should pass on to the first respondent all information material to her interests and should keep her reasonably informed of the status and progress of the SPA. More importantly, the appellant should consult the first respondent regarding any instruction to be taken which may affect her interests under the SPA.

Whether The Appellant Had Breached The Legal Profession Act 1976 And The Rules Under The Act

[26] The conduct of the appellant in this case, clearly shows that he disregarded his client's interest and acted in jeopardy of his client's interest. This is in breached of s. 94(3)(n) of the LPA and rr. 16 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978.

[27] Section 94(3) of the Legal Profession Act 1976 (Act 166) states:

> Section 94. Power of Disciplinary board to strike off the Roll, suspend for misconduct, etc.
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> (3) For the purposes of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:
>
> …
>
> (n) gross disregard of his client's interests; and …

[28] Rules 16, 31 and 35(b) of the Legal Profession (Practice and Etiquette) Rules 1978 respectively provide:

> Rule 16. Advocate and solicitor to uphold interest of client, justice and dignity of profession.
>
> An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.
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> Rule 31. Advocate and solicitor to uphold dignity of profession
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> Every advocate and solicitor shall at all times uphold the dignity and high standing of his profession.

[29] It is observed that the Disciplinary Committee has in its Disciplinary Committee report p. 20 para. 3(b) found that the appellant had not immediately advised the first respondent upon receipt of the vendor's solicitors' letter dated 8 January 2010 to enable her to pay cash to complete the SPA and avoid the forfeiture of her deposit, RM32,500; the appellant had acted in gross disregard of his client's interest pursuant to s. 94(3)(n) of the Legal Profession Act 1976.

[30] Based on the above facts, in my view, the DB's order is justified in the circumstances.

Conclusion

[31] Based on the above reasons, I do not propose to disturb the order of the DB. Accordingly, I dismissed the appellant's appeal with costs of RM2,000 to the first respondent.